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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

AIMEE TRUONG, Plaintiff and Appellant, v. TARGET CORPORATION, Defendant and Respondent.	B154977 (Super. Ct. No. BC229365)

APPEAL from an order of the Superior Court of Los Angeles County, Anthony J. Mohr, Judge. Affirmed.

Edwards, Wynn & Associates, Harold Von Rueden and Richard Wynn for Plaintiff and Appellant.

Morrison & Foerster, David F. McDowell and Camilo Echavarria for Defendant and Respondent.

INTRODUCTION

Plaintiff Aimee Truong appeals from an order denying class certification.[1] She contends her claims satisfied all the requirements for class certification under California law, but the trial court used improper criteria and legal assumptions in denying class certification. We disagree and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed this lawsuit as a class action suit, seeking damages, restitution and injunctive relief based on negligent misrepresentation; violation of the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq., "CLRA"); unlawful, unfair or fraudulent business practices (Bus. & Prof. Code, § 17200 et seq.); false and misleading advertising (Bus. & Prof. Code, § 17500 et seq.); negligent misrepresentation; negligence; and fraud. The suit arises from a promotion in Target stores offering a discount of $6 on the purchase of two packages of Energizer battery multi-packs with the purchase of an additional $20 in merchandise. This promotion ran approximately from September 1, 1999 through January 31, 2000.

Plaintiff alleged that there were 1.7 million Energizer battery multi-packs offered for sale or sold in Target stores, which multi-packs contained instantly-redeemable coupons. These coupons stated that purchasers would save up to $6 at the checkout counter when purchasing two of the multi-packs plus an additional $20 in merchandise. Each multi-pack contained a $3 coupon. Plaintiff additionally alleged that Target's cash registers were programmed to accept only one of the coupons per purchase. Target instructed its employees to scan one coupon and throw one in the trash when two coupons were presented.

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[1] An order denying class certification is appealable. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

Plaintiff further alleged that when she attempted to take advantage of the promotion, the cashier scanned one coupon and threw the other in the trash. She demanded that the cashier retrieve the second coupon from the trash and scan it. The cashier refused to do so, directing her instead to read the inside of the coupon, which limited persons to one coupon per purchase.

After defendant answered the complaint and discovery was conducted, defendant moved for an order denying class certification. Defendant claimed the evidence did not support class certification. The trial court granted the motion, agreeing with defendant that the evidence did not support class certification.[2]

The evidence presented on the motion was as follows: The outside of the coupon stated: "Save up to $6.00 at the checkout when you buy any two (2) Energizer Multi-Packs *and* additional $20.00 merchandise purchase. Coupons from two (2) specially marked packs required. Good only at Target stores." (Italics in the original.) On the inside of the coupon it stated: "Limit: $6.00 per purchase, $3 per coupon. . . . Limit 1 coupon (any kind) per purchase, limit one offer per coupon. . . ."

Isabell A. Seegert (Seegert) was employed as a cashier at the Target store on Garden Grove and Harbor. Seegert rang up plaintiff's purchase at the Target store. She scanned all of the items plaintiff purchased into her cash register, including two Energizer multi-packs. She removed both coupons from the packages and scanned both into her cash register. Once she read the coupons, she deleted one from the register and threw it into the trash. Seegert explained to plaintiff that the coupon said only one coupon was allowed per purchase. Plaintiff demanded that Seegert return the coupon to her. Seegert did so.

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[2] Following the granting of the order denying class certification, defendant obtained a summary judgment. Plaintiff also has appealed from this judgment. (*Truong v. Target Corporation*, B156662.) Because the judgment is under appeal, we cannot agree with defendant that the judgment renders this appeal moot.

Seegert did not recall receiving any instruction on processing the Energizer coupons. She processed 25 or fewer of the coupons. In order to process the coupons, she scanned them into her cash register. Based on the language inside the coupon, she accepted only one coupon per purchase. She did not accept two coupons per purchase and did not know how a customer would receive the $6.00 offered on the outside of the coupon.

Defendant has a list of mandatory coupon elements for inclusion on Target coupons and Target-specific manufacturers' coupons. One of these elements is a limitation of "one item/offer per coupon, one coupon per guest."

Target's cash registers were not specially programmed to accept only one Energizer multi-pack coupon per purchase. They would accept two coupons if two multi-packs were purchased.

Target's training manual does not specifically instruct cashiers regarding acceptance of one coupon per purchase. It instructs the cashiers that, when they receive a coupon from a guest, they should check to make sure the coupon has not expired. If the coupon has not expired, they should "[s]can the bar code on the coupon. The register automatically knows if you've already scanned the item the coupon is for, and will subtract the amount shown on the coupon from the guest's purchase." The manual also instructs the cashiers how to void a coupon "[i]f a guest decides not to purchase the item after you've entered the coupon information." The manual further instructs cashiers that if they have questions regarding any coupons, they should see their team leaders.

The manager of the Target store on Garden Grove and Harbor, Jeffrey Trice (Trice), verified that if a cashier had a question about a coupon, he or she would ask the team leader. If the team leader did not know how to handle the coupon, he or she would ask Trice. Trice received no questions regarding the Energizer multi-pack coupon. He received no complaints from any other customers that a cashier had refused to process both coupons.

Defendant's Business User Coordinator, Karla Erlandson, did not receive any complaints regarding the Energizer multi-pack promotion other than the complaint

plaintiff made. She knew of no complaints from other customers that they did not receive the full $6 refund on the purchase of two Energizer multi-packs. She knew of no cashiers other than Seegert who refused to accept two coupons on the purchase of two energizer multi-packs during the promotion.

Hard copies of each day's cash register receipts are kept in the Target store cash office for a limited period of time.[3] Electronic journals of all sales are kept for one year only.

In denying class certification, the trial court first found plaintiff presented no evidence establishing predominant questions of law or fact. Specifically, it found that she "produced no evidence to show that what occurred here was anything more than an error by one cashier." After failing to find evidence that Target programmed its cash registers to reject the second coupon for the Energizer multi-pack promotion, she claimed that Target trained its cashiers to reject the second coupon, but she produced no evidence to support that claim either. She produced no evidence that coupons were rejected at any other Target stores. The only evidence she produced was that one cashier may have rejected the second coupon in about 25 transactions.

In addition, the trial court found plaintiff produced no evidence Target retained records allowing the class to be ascertained. It found she produced no evidence establishing numerosity; the 25 other customers who may have had their second coupon rejected was insufficient for class certification. Further, plaintiff produced no evidence of deliberate conduct justifying class certification under CLRA.

DISCUSSION

Code of Civil Procedure section 382 "authorizes class suits in California when 'the question is one of a common or general interest, of many persons, or when the parties are

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[3] Trice was unsure for how long a period of time they were kept.

numerous, and it is impracticable to bring them all before the court.'" (*Linder v. Thrifty Oil Co.*, *supra*, 25 Cal.4th at p. 435.) In general, class suits are appropriate "'when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer.'" (*Ibid*.)

A trial court is "afforded great discretion in granting or denying certification." (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at p. 435.) Its ruling will be upheld if supported by substantial evidence "'unless (1) improper criteria were used [citation]; or (2) erroneous legal assumptions were made [citation]' [citation]." (*Id*. at pp. 435-436.) On appeal, the reviewing court thus examines the reasons for the trial court's grant or denial of class certification as well as the ruling itself. (*Bartold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 828-829.) If based on erroneous reasons, the trial court's order may be reversed even though supported by substantial evidence. (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 655; *National Solar Equipment Owners' Assn. v. Grumman Corp.* (1991) 235 Cal.App.3d 1273, 1281.)

The question of class certification is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at pp. 439-440.) Thus, the trial court considering class certification cannot consider the legal or factual merits of the case. (*Id*. at pp. 440-441.)[4] To the extent the trial court examines the factual allegations of the complaint, they will be accepted as true for purposes of ruling on class certification. (See, e.g., *Bartold v. Glendale Federal Bank*, *supra*, 81 Cal.App.4th at p. 830; *Caro v. Procter & Gamble Co.*, *supra*, 18 Cal.App.4th at p. 654; *Clothesrigger, Inc. v. GTE Corp.* (1987) 191 Cal.App.3d 605, 612.) If the evidence presented on the question of class certification is relevant to the merits of the action, the trial court nevertheless may consider it in ruling on class certification. (*Caro*, *supra*, at p. 656.)

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[4] If there is a question as to whether the lawsuit is legally or factually meritless, it may be resolved by demurrer or pretrial motion prior to consideration of class certification. (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at p. 440.)

In order to obtain class certification, a party must demonstrate that an ascertainable class exists and that there is a "well-defined community of interest among the class members." (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at p. 435; *Bartold v. Glendale Federal Bank*, *supra*, 81 Cal.App.4th at p. 828.) An ascertainable class is one which can be described by a set of common characteristics sufficient to allow class members to identify themselves based upon that description. (*Bartold*, *supra*, at p. 828.) A community of interest exists if there are "'(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" (*Linder*, *supra*, at p. 435.) Other factors include the probability class members will come forward to prove their claims and whether certification of the class would serve to deter and redress the alleged wrongdoing. (*Ibid*.)

Under CLRA (Civ. Code, § 1750 et seq.), a class action may be brought if: "(1) It is impracticable to bring all members of the class before the court. [¶] (2) The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members. [¶] (3) The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class. [¶] (4) The representative plaintiffs will fairly and adequately protect the interests of the class." (*Id*., § 1781, subd. (b).) If the foregoing criteria are met, the trial court must grant class certification; it has no discretion to deny it based on other considerations. (*Caro v. Procter & Gamble Co.*, *supra*, 18 Cal.App.4th at p. 654.)

Plaintiff argues that the trial court used improper criteria in denying class certification, in that it considered the merits of her action when ruling on the class certification issue. However, it is well established that when the merits of an action "are enmeshed with class action requirements, the trial court must consider evidence bearing on the factual elements necessary to determine whether to certify the class." (*Bartold v. Glendale Federal Bank*, *supra*, 81 Cal.App.4th at p. 829; *Caro v. Procter & Gamble Co.*, *supra*, 18 Cal.App.4th at p. 656.) Thus, the trial court did not err in considering the

merits of plaintiff's action to the extent it was necessary to do so in order to determine the question of class certification.

Plaintiff also argues that the trial court assumed an erroneous legal standard when denying class certification on her causes of action under Business and Professions code section 17200 et seq. and 17500 et seq. It erroneously "required specific elements of individual proof" for class certification, "i.e., intent, actual deception or reliance, knowledge of prior acts or complaints, and Target's transmittal of information regarding the limitation of its coupons."

Plaintiff cites nothing in the record demonstrating the trial court's assumption of an erroneous legal standard, however. The order itself does not refer to the "specific elements of individual proof" plaintiff mentions except in connection with the CLRA claim. Accordingly, plaintiff has failed in her burden of demonstrating the claimed error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

In sum, plaintiff has failed to demonstrate that the trial court used improper criteria or made erroneous legal assumption when ruling on defendant's motion. We thus uphold its exercise of discretion in denying class certification. (*Linder v. Thrifty Oil Co.*, *supra*, 23 Cal.4th at pp. 435-436.)

The order is affirmed.

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SPENCER, P.J.

We concur:

VOGEL (MIRIAM A.), J.

MALLANO, J.